RECORD AND BRIEFS

Nos. 16-74, 16-86, 16-258

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IN THE

Supreme Court of the United States

ADVOCATE HEALTHCARE NETWORK ET AL., *Petitioners*,

v.

MARIA STAPLETON ET AL., *Respondents*.

SAINT PETER'S HEALTHCARE SYSTEM ET AL., *Petitioners*,

v.

LAWRENCE KAPLAN, *Respondent*.

DIGNITY HEALTH ET AL., *Petitioners*,

v.

STARLA ROLLINS, *Respondent*.

On Writs of Certiorari to the Third, Seventh, and Ninth Circuits

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA has participated as *amicus curiae* in a range of cases in this Court to protect the rights of workers and their beneficiaries under ERISA. *See, e.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989).

SUMMARY OF ARGUMENT

I. The legislative history demonstrates that the courts of appeals below correctly interpreted ERISA's

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[1] All parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

church-plan exemption. In 1980, Congress amended the ERISA provisions at issue to accommodate churches' historical practices, not to create a new species of pension plans exempt from ERISA. The amendment accomplished two discrete and narrow goals. First, Congress eliminated the sunset on a grandfathering provision that had temporarily allowed churches to continue their longstanding practice of covering both church employees and church-agency employees in a single church-established plan. Second, Congress clarified that "pension boards," departments that churches had historically appointed to maintain their plans, could continue to maintain those plans without the church being stripped of the exemption.

A. Congress removed the sunset clause because churches and church agencies had a unique need to be covered under one plan. Churches had a longstanding history of covering the employees of their small affiliated agencies under their pension plans. And their ministers needed to remain covered in temporary positions at those agencies, when, for instance, serving as religious studies teachers. Petitioners' claim that the 1980 amendment was designed to create a new exemption for plans established by church agencies runs headlong into scores of pages of legislative history emphasizing the need for continuity of churches' historical practices and the concept of "one plan" for churches and their affiliated agencies. *Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Fin.*, 96th Cong. 365 (1979).

B. Congress also fixed certain "technical problems" with the original church-plan exemption to clarify that churches could continue using pension boards while maintaining ERISA-exempt church plans. 124 Cong. Rec. 12,107 (statement of Rep. Barber Conable). Members of Congress and church pension board executives made clear that they intended the amendment to allow churches to continue this longstanding practice, not to dramatically expand the exemption. The final version of the 1980 amendment expressly omitted the very language from earlier proposed legislation that would have adopted the interpretation that petitioners now ask this Court to accept, signaling Congress's intent to allow pension boards to maintain church pension plans but not to establish them in the first instance.

II. Neither of these adjustments changed the original dual purposes of the church-plan exemption: (1) avoiding government review of church books and records, and (2) protecting church-established pension plans funded solely by religious tithes. Exempting large healthcare providers like petitioners from ERISA would not advance these purposes.

A. First, the goal of avoiding government examination of church books and records would not be advanced through exempting plans established by multi-million-dollar hospital conglomerates, which are subject to numerous other disclosure requirements. Petitioners and other entities like them regularly open their books and records to government examination under Medicare, Medicaid, and the Affordable Care Act, and to comply with employment laws and regulations. Nor does petitioners' view avoid government inquiry into what

constitutes a church. After all, to know whether an agency is controlled by or associated with a church, a determination required under any view of the statutory text, the Government must define what a "church" is. *See* 29 U.S.C. § 1002(33)(C)(ii)(II).

B. Second, exempting organizations such as petitioners from ERISA's requirements would do nothing to serve Congress's interest in protecting church-established pension plans funded solely by religious offerings. Petitioners are large hospitals and health care networks. They operate like their secular non-profit and for-profit corporate competitors, and their retirement plans are not funded by tithes or religious offerings.

ARGUMENT

Respondents' brief explains why, using all of the traditional tools of statutory interpretation, the courts of appeals below correctly construed ERISA's church-plan exemption. This brief provides a more extensive examination of the legislative history behind that exemption, which corroborates what ERISA's text makes clear: a "church plan" must be established by a church.

According to the narrative that petitioners construct, Congress amended the exemption in 1980 so that any organization associated with a church could establish its own church plan and thereby exempt itself from ERISA. But as we now explain, the legislative history reflects Congress's effort to accommodate the way church pension plans traditionally functioned, not to overhaul the exemption's narrow scope.

I. Congress amended the narrow church-plan exemption to recognize the way that church plans had historically operated, not to exempt an entirely new category of private pension plans from ERISA.

Congress passed the Employee Retirement Income Security Act of 1974 to ensure the "well-being and security of millions of employees and their dependents." 29 U.S.C. § 1001(a). "Congress's primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). That is, Congress was concerned, based on its "careful study of private retirement pension plans," that funds promised by employers to employees for their retirements would not actually be there when their working days were over. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). To that end, ERISA "protect[ed] . . . the interests of participants in private pension plans . . . by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C. § 1001(c).

From the beginning, Congress exempted only one group of private employers from ERISA's otherwise sweeping reach—churches. 29 U.S.C. § 1003(b) (original 1974 version). As originally enacted, Congress defined a "church plan" as "a plan established and maintained . . . for its employees . . . by a church or by a convention or association of

churches which is exempt from tax under section 501 of title 26." *Id.* §§ 1002(33)(A), 1003(b)(2). This original version also contained a grandfathering provision, to sunset in 1982, that treated a plan in existence on January 1, 1974 as a church plan if it had been "established and maintained by a church or convention or association of churches for its employees and employees of one of more agencies of such church." *Id.* § 1002(33)(C) (1974 version). In other words, existing church-established pension plans could temporarily continue to cover both a church's employees and employees of the church's agencies.

As the sunset loomed, in 1980, Congress made two changes to the church-plan exemption in response to churches' concerns about their ability to comply with the exemption as originally enacted. 124 Cong. Rec. 16,522 (1978). These modifications aimed to continue the tradition that churches are exempt from ERISA by doing two things: (1) eliminating the sunset clause, and (2) accommodating the role of entities colloquially known as "pension boards" in the maintenance of church plans.

We now explain each of these limited aims in turn. Neither remotely supports petitioners' claim that the 1980 amendment authorized all manner of church affiliates to establish their own ERISA-exempt pension plans.

A. Congress eliminated the sunset clause to permanently allow churches to continue their historical practice of covering both church employees and church-agency employees under one plan.

As 1982 approached, Congress sought to eliminate the sunset clause, lest church-established plans would no longer be able to cover church-agency employees. In 1980, it did just that in the Multiemployer Pension Plan Amendment Act, Pub. L. No. 96-364, § 407, 94 Stat. 1208 (1980). Although the amendment permanently authorized church-established pension plans to cover employees of church agencies, it still required churches to "establish" plans to qualify for ERISA's church-plan exemption. It thus retained the "church plan" definition as "[a] plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention of churches which is exempt from tax under section 501 of Title 26." 29 U.S.C. § 1002(33)(A).

At the same time, Congress clarified that the term "employee" includes "an employee of an organization . . . which is controlled by or associated with a church or a convention or association of churches." *Id.* § 1002(33)(C)(ii)(II). The church is "deemed the employer" of any such "employee." *Id.* § 1002(33)(C)(iii). Thus, under the 1980 amendment, a church's pension plan could cover both church employees and church-agency employees without losing its ERISA-exempt "church plan" status.

Congress did not, as petitioners assert, intend to allow church agencies to establish their own ERISA-exempt church plans. *See* Petrs. Br. 33-35. Rather, it

intended to maintain the status quo and, thus, preserve churches' historical practice of establishing pension plans covering both church employees and employees of their affiliated agencies.

1. Churches and church agencies had a unique need to be covered under one plan.

a. "[C]hurch plans," which were "some of the oldest retirement plans in the country . . . dat[ing] back to the 1700's," had "historically covered both ministers and lay employees of churches and church agencies." 125 Cong. Rec. 10,052 (1979) (statement of Sen. Herman Talmadge). Congress recognized that if the sunset clause were to take effect—thereby making it impossible for ERISA-exempt church-established pension plans to cover their affiliates' employees—churches would be required to "divide their plans into two so that one will cover church employees and the other, agency employees." *Id.* It would be "no small task to break up a plan that [had] been in existence for decades, even centuries." *Id.* Thus, Congress simply wanted churches "to continue to cover the employees of church-associated organizations" without "separat[ing] the employees of church agencies from the church plan." *Id.*

This purpose was evident on both sides of the Capitol. For example, Representative Barber Conable introduced the amendment in the House "to permit a church plan to continue after 1982 to provide benefits for employees of organizations controlled by or associated with a church." 124 Cong. Rec. 11,103. A Senate sponsor, Herman Talmadge, made the same point: the amendment would "permit a church plan to continue to provide retirement and welfare benefits for agency employees." *Miscellaneous Pension Bills:*

Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Fin., 96th Cong. 365 (1979) (*Hearings*). And after approval of the amendment by the Senate Committee on Labor and Human Resources and the Senate Committee on Finance, 126 Cong. Rec. 20,190 (1980), the committees' official summary explained that the "present law" allowed "a church plan" to "cover employees of a tax-exempt agency related to a church only if the plan was in existence on January 1, 1974," and only until the sunset, "December 31, 1982." 126 Cong. Rec. 20,208. The official "[r]eason for change," the summary explained, was the committees' "belie[f] that plans maintained by churches should be allowed to cover all employees of related tax-exempt agencies." *Id.*

b. Senator Talmadge observed that "the concept of one plan for both church and agency employees is critical for a further reason": that it "allows ministers and lay employees to move from church to agency and back without gaps in plan coverage and with coverage by one retirement system." *Hearings* at 365. For example, United Methodist-ordained clergy often "changed appointments from local churches into . . . such areas as the chaplaincy, church-related and other education institutions, and other areas of work." 125 Cong. Rec. 10,057-58 (letter from James Walton-Myers, General Board of Pensions of the United Methodist Church). Likewise, "numerous Baptist ministers . . . [were] employed as chaplains in hospitals, prisons or colleges, or teaching religious studies in an educational institution, or serving as self-employed evangelists." *Hearings* at 480 (statement of Rev. Gordon E. Smith on behalf of American Baptist Churches). Because of this fluidity

in employment, Congress recognized that churches and church agencies had a "unique need to be covered by one plan." 125 Cong. Rec. 10,052.

These considerations could not, as petitioners maintain, possibly relate to plans *established* by church agencies in the first instance. The problem of separating church plans from church-agency plans would be magnified, not mitigated, if the 1980 amendment authorized church agencies to establish their own "church plans." After all, a church agency-established plan is necessarily separate from and additional to the plan established by the church itself. In that case, the "concept of one plan" would not be relevant, let alone "critical." *See Hearings* at 365.

2. Petitioners' position that the amendment allowed church agencies to establish their own church plans finds no support in the legislative history.

a. Petitioners argue that Congress intended the 1980 amendment to respond to the concerns of the Church Alliance for Clarification of ERISA (a group of pension-program chief executives) as expressed in 20 letters to Senator Talmadge. Petrs. Br. 34-35; *see* U.S. Br. 4-5. That may be true. But those letters, one after the next, evidence concern from church pension-board directors that, without legislative action, church-established pension plans would not be able to continue covering both church employees and church-agency employees and retain their ERISA exemption. 125 Cong. Rec. 10,054-58.

For instance, the Lutheran Church-Missouri Synod representative explained that the amendment would prevent its pension program from "hav[ing] to

be divided into two programs." 125 Cong. Rec. 10,054. The United Presbyterian Church (USA) representative explained that, without an amendment, "church plans will be unable to serve all employees of churches and church agencies without becoming subject to the requirements of ERISA." *Id.* And, similarly, the Christian Church representative explained that "the law as now written would separate [the board] from almost a century of service to [church agencies] by 1982." 125 Cong. Rec. 10,055. And so on.[2] None of these letters argued in favor of authorizing church agencies to establish their own plans and retain the ERISA exemption.

As evidence that the amendment allowed church agencies to establish their own ERISA-exempt church plans, petitioners quote the Church Alliance's statement that, absent the amendment, "agencies will have . . . to terminate their plans." Petrs. Br. 39 (quoting *Hearings* at 387). But that snippet is ripped out of context, and the previous sentence of the

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[2] *See, e.g.*, 125 Cong. Rec. 10,055 (letter from the American Lutheran Church) (supporting the amendment "so that church related agencies are recognized as part of a church or convention of churches and entitled to participate in a church plan"); 125 Cong. Rec. 10,055-56 (letter from the United Church of Christ Pension Boards) (supporting legislation "intended . . . to provide for the coverage of church agencies and ministers, wherever carrying out their ministry, within the church plan"); 125 Cong. Rec. 10,056 (letter from Southern Baptist Convention Annuity Board) (explaining that the Board "supports benefits and annuities for ministers of the gospel and other denominational workers" and advocating for "church related agencies [to be] recognized as part of a church or convention of churches and entitled to participate in a church plan").

Alliance's statement—mentioned nowhere by petitioners—reflects the Alliance's actual position: that "because of the close relationship that exists between churches and their affiliated agencies, it is essential that the employees of the agencies be eligible for coverage under the *benefit plans of the church*." *Hearings* at 387 (emphasis added).

Petitioners make much of the United Church of Christ's statement that ERISA might classify some of its bodies as churches and others as church agencies, "[b]ut all of which are a part of the church as far as our own determination is concerned." Petrs. Br. 34 (quoting *Hearings* at 375). But the United Church of Christ's pension-board executive, John Ordway, did not argue that the agencies should be able to establish their ERISA-exempt "church plans." He urged only that the church's current plan should be able to continue to cover church-agency employees while remaining exempt from ERISA. *Hearings* at 375. Ordway's concerns over the "tremendous amount of employee mobility" between the church and its agencies and the "expensive breaking up" of pension systems only makes sense if he was urging Congress to ensure that churches could continue to cover church employees and agency employees under *one* ERISA-exempt, church-established plan. *Id.* at 375-76. Nothing Ordway said suggests he favored a legislative scheme under which there could be *two* (or more) ERISA-exempt plans: those established by a church and those established by that church's affiliate(s).

The General Counsel of the Southern Baptist Convention's annuity board likewise expressed concern that, unless Congress acted, church pension

boards would be unable to "continue to serve [church] agencies" within one church plan. *Hearings* at 401 (statement of Gary S. Nash). Reiterating Ordway's point, he noted that "ministers and lay employees are highly mobile" between churches and denominational organizations. *Id.* at 400. Dozens of other statements from interested parties repeated these core concerns. And, perhaps more to the point, none of them suggested church agencies should be able to establish their own ERISA-exempt pension plans. *See Hearings* at 382-488. To be sure, the Southern Baptist Convention expressed "concern over what the Internal Revenue Service and the Department of Labor are going to decide are 'agencies' which cannot participate in church plans after December 31, 1982." Petrs. Br. 34 (quoting *Hearings* at 401). But this statement does not suggest that the Southern Baptist Convention wanted these church-affiliated agencies to be authorized to establish their own ERISA-exempt plans.

b. Petitioners assert that there was a "general understanding" that the amendment "placed church agencies and churches on equal footing and accommodated plans that were the agencies' alone[.]" Petrs. Br. 38. Not so. Petitioners' effort to find support for their claim in the legislative record rests on vague and out-of-context references to "agency plans."

Petitioners argue (at 38) that Treasury Department official Daniel Halperin, in a hearing before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Senate Committee on Finance, expressed concern that the amendment would exempt plans established by

church agencies. But the legislative record shows no such thing. Halperin understood that, as originally enacted, ERISA exempted "plans established by churches." *Hearings* at 189. He was concerned that the amendment "continu[ed] exemptions . . . for church and government plans," not that the amendment created a new class of church-related organizations entitled to claim an exemption. *Id.* at 190. In that context, he objected to "the expansion of the complete exemption from ERISA from churches to church-related agencies" with the understanding that, under the amendment, church-established plans would continue to be able to cover church-agency employees. *Id.* He never indicated that church agencies could, under the proposed amendment, establish their own ERISA-exempt plans.

Similarly, petitioners misconstrue Halperin's statement that the amendment "would exclude church agencies from the protection of ERISA, and that would mean that if somebody works for a hospital or a school that happens to be affiliated with a church it would be permissible for that plan to provide no retirement benefits unless the[ir employees] work until age 65, for example." Petrs. Br. 39; *see also* U.S. Br. 18 (quoting *Exec. Sess. of S. Comm. on Fin.*, 96th Cong. 41 (1980)). Even understood in a vacuum, this statement says nothing about whether, under the amendment, church agencies would be able to *establish* ERISA-exempt "church plans." The church-agency employees might simply be unprotected by ERISA because eliminating the sunset would have authorized churches to continue covering church-agency employees in their own ERISA-exempt "church plans."

In any case, read in context, Halperin's statement plainly does not support petitioners' view of the 1980 amendment. Halperin was responding to Senator Talmadge's call for "objection[s]" to his explanation that the amendment would be "necessary to continue the current church plan definition" in allowing churches to preserve their "common practice" of covering church-agency employees. *Exec. Sess. of S. Comm. on Fin.*, 96th Cong. 40 (1980). Halperin was simply objecting to this core component of the amendment, not suggesting that, under it, church agencies would be authorized to establish their own pension plans and remain ERISA-exempt.

Likewise, petitioners quote one bare phrase, "the inclusion of agency plans," from the Southern Baptist Convention Annuity Board president's testimony to contend that this executive understood the amendment to exempt a church agency's own pension plan. *See* Petrs. Br. 40 (quoting *Hearings* at 374). But the full sentence stands for the unremarkable fact that "agency plans" were *not* included in the original church-plan exemption. *See Hearings* at 374. Like so many other witnesses, this annuity board president wanted Congress to make permanent the 1974 provision allowing churches to cover church-agency employees in their own plans—that is, he simply wanted Congress to eliminate the sunset clause. In this manner, Congress would enable his annuity board to "continue to serve" church-affiliated agencies. *Id.* If Congress did not eliminate the sunset, he explained, "a church plan [could] not include employees of church agencies if the church plan is to maintain its exemption." *Id.*

* * *

In sum, Congress's express and narrow purpose was to eliminate the sunset on a provision that had temporarily allowed churches to cover church-agency employees in their own church plans while remaining ERISA-exempt. Petitioners, on the other hand, would transform that narrow goal into an intent to create a novel and broad exemption to ERISA by appealing to a more "general" (but unstated) "understanding." Petrs. Br. 38. Similarly, according to the Government, a "fundamental purpose" of the amendment was to allow both churches and church agencies to establish ERISA-exempt church plans. U.S. Br. 19. That leaves one to wonder why, if that purpose was so "fundamental," no one involved in the legislative process ever mentioned it.

B. Congress amended ERISA to allow a plan established by a church and maintained by a pension board to qualify for the "church plan" exemption.

Many "'church plans' are administered or funded by pension boards, separate corporate entities that are associated with and controlled by the churches[.]" *Hearings* at 411 (statement of the Ministers and Missionaries Benefit Board of the American Baptist Convention). In the 1980 amendments, Congress sought to clarify that churches' historical practice of enlisting "principal purpose" organizations to maintain their pension plans could continue under the church-plan exemption.

For this reason, Congress added language providing that:

> a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches

> includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

29 U.S.C. § 1002(33)(C)(i). Congress included this language to address the "technical problem" of whether the common practice of having a pension board maintain a church's pension plan could continue under the ERISA "church plan" exemption. 124 Cong. Rec. 12,107 (statement of Rep. Conable). The legislative history of this provision shows that Congress did not intend this change to expand the church-plan exemption dramatically. It simply "believed that the church plan definition should be clarified" to expressly include church-established plans maintained by pension boards. 126 Cong. Rec. 20,245 (1980) (statement of Sen. Russell Long).

1. Congress sought only to clarify—not dramatically alter—the ERISA "church plan" exemption.

a. Congress meant to clarify "whether a plan maintained by a pension board is maintained by a church." 124 Cong. Rec. 12,107 (statement of Rep. Conable). Representative Barber Conable, the legislation's House sponsor, put it this way: "the bill also recognizes pension boards as an acceptable funding media for church plans." *Id.* at 16,523. The

goal of the pension-board amendment was to ensure that "[n]o church plan administered or funded by a pension board would be disqualified merely because it is separately incorporated." *Id.*

This same purpose was evident on the Senate side. Introducing his bill on the floor, Senator Talmadge stated that the bill would "retain the definition of church plan as a plan established and maintained . . . by a church" but make minor changes so that "a plan or program funded or administered by a pension board . . . will be considered a church plan[.]" 125 Cong. Rec. 10,052-53.

Petitioners cite Senator Talmadge's statement that "a plan or program funded or administered through a pension board" would be covered under ERISA's "church plan" exemption. Petrs. Br. 37 (citing 125 Cong. Rec. 10,053). But this statement says nothing about eliminating the church-establishment requirement. After it accepted Senator Talmadge's proposed amendment, the Senate Finance Committee issued a press release "agree[ing] that the current definition of a church plan"—which under the 1974 version of the Act was "established and maintained by a church"—"would be continued . . . [and] clarified to include plans maintained by a pension board maintained by a church." Press Release, S. Comm. on Fin., Finance Committee Orders Favorably Reported S.1076, the Multiemployer Pension Plan Amendments Act of 1980, p. 8 (June 12, 1980). Plans maintained by a pension board still had to meet the "*current* definition of a church plan," which, at the time, meant plans established by a church. *Id.* (emphasis

added); *see* 29 U.S.C. §§ 1002(33)(A), 1003(b)(2) (1974 version).

Similarly, without ever mentioning the possibility of eliminating the church-establishment requirement, Senator Talmadge explained that his amendment would expand the definition "to include church plans which rather than being maintained directly by a church are maintained by a pension board maintained by a church." *Exec. Sess. of S. Comm. on Fin.*, 96th Cong. 40 (1980). Nowhere did he suggest that a pension board could itself *establish* an ERISA-exempt pension plan.

b. The limited nature of Congress's goal with respect to pension boards is underscored by the concerns voiced by churches and church pension boards advocating for the 1980 amendment. These organizations worried that some traditional church pension arrangements—such as the pension boards maintained by the American Baptist Churches and the United Church of Christ—might not be considered ERISA exempt "church plans" because, although they had been established by churches, they were maintained by separately incorporated pension boards. *Hearings* at 440. So, they sought clarification. *See id.* at 382.

As noted above (at 10), denominational pension-board chief executive officers formed the Church Alliance for the Clarification of ERISA, focusing primarily on "noncontroversial" "revis[ions] [to] the church plan definition." *Hearings* at 440. These officers wrote that "it seems reasonable to assume, when Congress exempted 'church plans' from the requirements of ERISA it intended to include within the exemption . . . the plans *administered* by these

church pension boards." *Id.* at 412 (letter from the American Baptist Churches) (emphasis added); *see also id.* at 385 (letter from Gary Nash, Church Alliance for Clarification of ERISA stating that "by failing to recognize church pension boards in ERISA . . . ERISA fails to deal with the question of whether a church pension board will be allowed to *fund or administer* annuity programs without operating under a 'church plan' exemption") (emphasis added).

To support their argument that the exemption should be clarified to cover the way that church pension boards had traditionally operated, churches testified about the history of pension boards created by churches to administer pension plans for these employees. The American Baptist Churches, for instance, explained that pension boards "[were] established by a broad spectrum of religious denominations to serve their own particular religious needs . . . [and] it seems appropriate, therefore, for the responsible governmental agencies to take these historical differences into account in formulating regulations defining church plans." *Hearings* at 436. The church detailed how it had received generous donations, enabling "the denomination [to take] the first step toward providing an adequate retirement income to the ministers and missionaries" and how, later, the denomination made the decision to incorporate a Ministers and Missionaries Benefit Board to administer the church's pension plan. *See id.* at 414-16.

2. Congress never intended to authorize pension boards to *establish* and maintain their own pension plans.

a. Contrary to petitioners' assertions, the legislative history is bereft of any effort by churches to exempt from ERISA plans *established*, as well as maintained, by pension boards. Petitioners cite testimony from the Southern Baptist Convention's separately-incorporated annuity board to support their argument that church leaders wanted pension boards to be authorized to establish ERISA-exempt plans. Petrs. Br. 36. But the Convention "urge[d] that a denominational pension board which funds or administers church plans be given as an example" of an arrangement that would meet the ERISA "church plan" exemption. *Hearings* at 402. It did not at any point urge Congress to exempt plans established by a pension board or any other church-affiliated agency.

The United Church of Christ likewise asked Congress only to alter the "church plan" exemption to "include[] within [the definition of a 'church plan'] a plan established by a convention or association of churches but maintained by a separate corporation associated or controlled by those churches." *Hearings* at 461. Petitioners' argument that church pension boards established pension plans is belied by the fact that none of those churches advocated for language that would have allowed the practice. Petitioners can point to only one mention of a church pension board having had "established" a church plan. Petrs. Br. 36 (citing *Hearings* at 415-17). This one fragment, buried deep within hundreds of pages of hearing testimony, is anomalous, and legislators in fact had no understanding "that church affiliated

organizations, including 'pension boards,' established and maintained pension plans." *Id.*

Petitioners rely erroneously on a statement by the Board of Annuities and Relief of the Presbyterian Church that, absent the 1980 amendment, the "board will have no alternative but to create new Plans for [agency] employees and make these plans subject to ERISA." *Id.* (quoting *Hearings* at 471-72). Petitioners cite this statement for the proposition that pension boards had a practice of establishing pension plans for church-agency employees. However, this statement supports the exact opposite conclusion: that church pension boards recognized that if the pension board, and not the church, established a pension plan then that plan would be subject to ERISA. The Presbyterian Board was urging elimination of the sunset clause, which would have compelled the Board to establish a separate, ERISA-compliant plan to cover church-agency employees. *Hearings* at 471-72. The Board never disputed that any plan that *it* established would have to comply with ERISA or, put differently, that an ERISA-exempt plan must be *established* by a church.

b. The legislators, for their part, also said nothing about allowing organizations other than churches to establish pension plans and still receive the church-plan exemption. In fact, during the legislative process, relevant language was consciously amended to avoid this interpretation. Petitioners rely on statements made about an earlier version of the amendment, a version that specifically allowed plans "established and maintained" by pension boards to be exempt from ERISA. But petitioners omit the fact that the final, enacted version did not include the key

language "established." The Government, meanwhile, acknowledges the change in language, but draws the wrong conclusion about its meaning.

An amendment was introduced in the late 1970's, not as part of the Multiemployer Pension Plan Amendments Act, but as free-standing legislation, Senate Bill 1091 (1979). That version, and two predecessors (S. 3182 (1978) and H.R. 12172 (1978)), would have exempted plans "established and maintained" by a "principal purpose" organization—that is, a pension board—from ERISA. *See* 124 Cong. Rec. 12,108 (reproducing H.R. 12172). Petitioners cite Treasury official Daniel Halperin's testimony on the bill, in which he expressed the Treasury's concern that "S. 1091 would go substantially further by permitting a plan which is established and maintained by the administering organization to be considered a church plan." *Hearings* at 222; *see* Petrs. Br. 38. Similarly, petitioners cite Senator Talmadge's statements that "under the church plan definition [in S.1091], there is a question whether the plan is established by a church, as it must be, or by a pension board." 124 Cong. Rec. 16,522; 125 Cong. Rec. 10,052.

To the extent that these statements use language that could support petitioners' view of the statutory text, both simply reflect the language of the never-enacted Senate Bill 1091. Halperin's testimony raised concerns about the impact of the proposed language in that bill, and he advised the Subcommittee on Private Pensions Plans and Employee Fringe Benefits that the Treasury Department believed it was "not appropriate to expand the definition of a church plan this far." *Hearings* at 222.

Perhaps in response to Halperin's concerns, the final version of the amendment eliminated the language—"established"—that would have authorized this expansion, and preserved the church-establishment requirement while authorizing certain church affiliates, like pension boards, to maintain (but not establish) ERISA-exempt plans. As enacted, the amendment exempted only those plans "maintained by" "principal purpose" organizations. 29 U.S.C. § 1002(33)(C)(i). Petitioners' theory of the case is thus undermined "by drafting history showing that Congress cut out the very language in the bill that would have authorized" their interpretation. *Doe v. Chao*, 540 U.S. 614, 622 (2004). "The deletion of ['established'] from the bill is fairly seen, then, as a deliberate elimination" of the notion that pension boards or other church agencies could establish their own ERISA-exempt pension plans. *Id.* at 23.[3]

c. Consistent with the change reflected in the final 1980 legislation, subsequent statements in the legislative history focus solely on "church plans which rather than being maintained directly by a church are instead *maintained* by a pension board maintained by a church." *See Exec. Sess. of S. Comm. on Fin.*, 96th Cong. 40 (1980) (emphasis added); *see also, e.g.*, Sen. Labor & Hum. Resources Comm. Rep.

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[3] Even if the final legislation had authorized "principal purpose" organizations to both establish and maintain "church plans," petitioners would not be entitled to exemption from ERISA because their "principal purpose or function" is not "the administration or funding" of pension plans for "the employees of a church." 29 U.S.C. § 1002(33)(C)(i). *See* Resp. Br. 27-28 & n.14.

on H.R. 3904 (Aug. 15, 1980) ("The definition would be clarified to include plans maintained by a pension board maintained by a church."). Thus, contrary to the Government's assertions that the deletion of "established" from the earlier versions of the bill "broadens" the meaning of the amendment, U.S. Br. 23-24, in fact it demonstrates that Congress changed the language from the initial bill to keep the exemption narrow and maintain the church-establishment requirement.

II. The church-establishment requirement is consistent with the exemption's limited goals.

Congress's 1980 decision to retain the church-establishment requirement makes sense in light of the exemption's original and unchanged dual purposes: (1) avoiding government review of confidential church information, and (2) protecting small church-agency pension plans funded solely by religious offerings. A narrow church-plan exemption, which requires that a church "establish" an ERISA-exempt pension plan, fully advances these two goals.

A. A narrow church-plan exemption effectively serves Congress's goal of avoiding government examination of church "books and records."

1. As enacted in 1974, ERISA included the church-plan exemption to avoid the "examinations of books and records" required by "the careful and responsible administration of the insurance system" and "regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 93–383, at 81 (1973).

Allowing a church to cover those employees moving between the church and its agency under an ERISA-exempt church-established plan advanced this interest because church agencies were typically "staffed by two to three persons" working "at personal sacrifice" and "essential to the churches' mission." 124 Cong. Rec. 12,107 (statement of Rep. Conable). But exempting plans established by multi-million-dollar hospital conglomerates does nothing to serve Congress's purpose of preventing entanglement because entities like petitioners are subject to numerous federal and state disclosure requirements and, thus, already provide details on their financial records and relationships.

By participating in Medicare and Medicaid, petitioners regularly open their books and records to government examination. J.A. 258 (Advocate Compl.), 429 (SPHS Compl.), 778 (Dignity Compl.). As "a condition of participation" in these insurance programs, religious non-profit, secular non-profit, and for-profit hospitals alike all must open their books and records to examination when they "supply the Secretary [of Health and Human Services] or the appropriate State agency with full and complete information as to the identity of each person with an ownership or control interest . . . in the entity." 42 U.S.C. §§ 1320a-3(a)(1), 1320b-16; *see also* 42 U.S.C. § 1320a-7(b)(9)-(12); 42 C.F.R. §§ 1001.1101, 1002.4. Under these programs, the Government also examines hospital books and records when determining health-care providers' reimbursement eligibility and investigating whether patients are receiving services that are medically necessary and economically efficient as required by law. 42 U.S.C. §§ 1320a-3a, 1320c-5.

Petitioners likewise disclose details of their complex financial records to rating agencies in conjunction with the issuance of tax-exempt revenue bonds. *See* J.A. 258 (Advocate Compl.), 429 (SPHS Compl.), 778 (Dignity Compl.). And, a simple Google search reveals that, despite taking advantage of the ERISA church-plan exemption intended to protect the confidentiality of church records, petitioners' financial information is available online for all to see. Advocate Fin. Report, http://tinyurl.com/j35a3fw; Dignity Inv'r Relations, http://tinyurl.com/hs39zby; SPHS Fin. Info., http://tinyurl.com/zrxbp24.

Petitioners are also subject to employment laws that require disclosure. The Family and Medical Leave Act requires employers of more than fifty people to "make, keep, and preserve records pertaining to compliance," which the Secretary of Labor may inspect annually. 29 U.S.C § 2616(b), 2616(c). Similarly, Equal Employment Opportunity Commission (EEOC) regulations implementing the Americans with Disabilities Act mandate that employers with more than fifteen employees "furnish specified information to aid in the administration and enforcement of the Acts." 29 C.F.R. § 1602.1.

Along the same lines, employers must comply with the Age Discrimination in Employment Act, which authorizes the EEOC "to make investigations and require the keeping of records necessary or appropriate" to enforce the law. 29 U.S.C. § 626(a). And under Title VII of the Civil Rights Act of 1964, petitioners must "make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed," and report on these records at the

request of the EEOC "by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement" of the law. 42 U.S.C. § 2000e-8(c).

Petitioners are all large employers. Advocate employs at least 33,000 people, J.A. 272, Dignity employs approximately 60,000, J.A. 774, and SPHS employs over 2,800, J.A. 428. They are, thus, unlike small church-associated agencies that "usually involve 1 to 5 employees," *Hearings* at 375 (statement of John Ordway), and that are exempt from employment reporting requirements because of their size. Finally, when it makes financial sense for petitioners, they subject their books and records to Government review under ERISA itself. Advocate has established an ERISA-compliant 401k retirement plan and health and welfare plans. J.A. 265. Dignity has established ERISA health and welfare benefit plans, dependent life insurance plans, and short-term disability plans and thus must comply with ERISA's own records and inspection requests. J.A. 781; *see* 29 C.F.R. §§ 2520.101–1, 2520.101–2. And SPHS acknowledges that its health benefit plan is not a church plan. J.A. 431, 469.

2. Petitioners argue that the church-establishment requirement "reintroduc[es] precisely the impermissible religious entanglement that the 1980 amendment sought to avoid." Petrs. Br. 20. But this cannot be right. The church-establishment requirement indisputably existed before the 1980 amendment. *See* Petrs. Br. 2; U.S. Br. 3. And, at that time, its only purpose was to avoid "the examinations of books and records" that "might be regarded as an unjustified invasion [by the Government] of the

confidential relationship" regarding "churches and their religious activities." S. Rep. No. 93–383, at 81 (1973). Although in 1980 Congress might have wanted to do *more* to avoid entanglement, it would have been difficult for Congress to constitutionally achieve this goal. *See* Resps. Br. 56-57. Besides, as explained above (at 10-15), Congress in fact had no such intent.

All that petitioners offer in support of their claim that the 1980 amendment sought to enhance protection of church books and records is the IRS's 1977 finding that a pension plan established by two orders of Catholic sisters for employees of their hospital did not meet the exemption's church-establishment requirement. Petrs. Br. 33. But petitioners are unable to connect the dots between the IRS decision and the 1980 amendment because legislators at that time did not denounce, or for that matter even reference, an "inquiry into what constitutes a church." *See id.* Thus, petitioners cite no statements by members of Congress to support their claim that the 1980 amendment eliminated the church-establishment requirement or, more to this point, that it did so to do more to avoid government review of church books and records.

Further, rather than requiring the Government to decide whether a church agency is part of a church, *see* Petrs. Br. 57, the church-establishment requirement leaves to the church the decision of whether or not to cover church-agency employees under a single church-established plan. This approach allows a church that is concerned about preventing government examination of confidential information to cover church-agency employees and

avoid any threat of entanglement. That is, nothing is stopping the churches with which petitioners are affiliated from covering petitioners' employees under their own church-established plans—nothing except that petitioners are entirely unlike the church agencies Congress sought to protect. Churches do not want to cover thousands of hospital employees under one church-established plan because that would put church assets at risk. Contrast that with the scheme Congress designed to accommodate churches' desire to bring under their own pension plans a minister temporarily assigned to the local jail or a handful of daycare employees.

Petitioners and the Government contend that a church-establishment requirement compels government agencies to answer questions about what constitutes a church, undermining religious autonomy. Petrs. Br. 57; U.S. Br. 33 n.8. But this argument proves far too much. With or without the church-establishment requirement, the Government must still make some determination about what qualifies as a church. This is so because, without knowing what constitutes a church, it would be impossible for the Government to know whether an institution is "controlled by or associated with a *church* or a convention or association of *churches*." 29 U.S.C. § 1002(33)(C)(ii)(II) (emphasis added).[4]

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[4] In any case, the determination of an organization's status as a church eschews an inquiry into the belief system of the church's adherents. *See* IRS, Tax Guide for Churches & Religious Organizations, at 33, https://www.irs.gov/pub/irs-pdf/p1828.pdf ("The IRS makes no attempt to evaluate the content of whatever doctrine a particular organization claims is

B. A narrow church-plan exemption fully achieves Congress's goal of protecting pension plans funded by religious offerings.

1.a. By exempting church-established plans, Congress also wanted to protect pension plans funded solely by parishioners' donations. Senator Talmadge explained that "[i]f a business incurs increased plan maintenance costs, it merely passes these on to the consumer. The incomes of most church agencies, on the other hand, are dependent solely upon tithes and other offerings. There is virtually no way for them to compensate for additional costs of complying with ERISA." 125 Cong. Rec. 10,052 (1979).

Church representatives lobbying Congress to eliminate the 1982 sunset clause underscored these same points. The United Church of Christ explained that "[a] church, as an entity, is very different from the traditional corporate entity," making it difficult to cover church and church-agency employees under separate pension plans. *Hearings* at 375. As the Southern Baptist Convention put it, the funds for their church-agency employees' retirement benefits came from "tithes, offerings, and other contributions received from the congregations at large," rather than from typical corporate revenue. 126 Cong. Rec. 12,982 (1980).

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religious, provided the particular beliefs of the organization are truly and sincerely held by those professing them . . . ."). And unlike other non-profit institutions, a church is automatically entitled to non-profit status and need not apply for such recognition from the IRS. *See id.* at 2.

The amendment's sponsors were responding to "the special needs" of "churches, ministers, and lay persons" working with small, church-associated agencies "disseminating religious instruction and caring for the sick, needy, and underprivileged." 124 Cong. Rec. 12,107 (1978) (statement of Rep. Conable). But Congress gave no indication that it was also interested in allowing large church affiliates that lack special needs, and, in fact, had complied with ERISA, J.A. 429, to put their financial interests ahead of the interests of their employees.

b. The goal of safeguarding pension plans funded through tithes and religious offerings is not advanced by exempting giant hospital conglomerates. Whereas the agencies Congress sought to protect relied on congregational donations for revenue and were "often very small" church affiliates that "operate[d] marginally" with small staffs working "at a personal sacrifice," 124 Cong. Rec. 12,107 (statement of Rep. Conable), petitioners operate quite like "traditional corporate entit[ies]," *Hearings* at 375.

Petitioners do not rely on tithes or other congregational contributions for revenue, and they do not have special needs in comparison to their competitors. J.A. 256 (Advocate Compl.), 438 (SPHS Compl.), 774 (Dignity Compl.). SPHS receives no funding from any church. J.A. 438. It serves as the parent company for a private debt collection company, a solar energy provider, an insurance company incorporated in the Cayman Islands, and Saint Peter's University Hospital. J.A. 427-28. It had $43 million in revenue in 2014. SPHS's Consol. Fin. Statements, http://tinyurl.com/hbje2h7. Though the smallest entity among petitioners, SPHS managed to

operate an ERISA-compliant plan from January 1974 to 2006. J.A. 429. Advocate is Illinois' largest health care employer, and it generates $4.6 billion in annual revenue. J.A. 256. None of this revenue comes from the church. J.A. 257-58. And Dignity is the nation's fifth largest health-care system. J.A. 774. In 2012, it had $13.5 billion in assets and $10.5 billion in revenues. J.A. 774. It is neither owned by nor receives any funding from a church. J.A. 777.

Petitioners are no exception. Religiously affiliated hospitals make up a majority of the nation's largest non-profit health care providers. Molly Gamble, *25 Largest Non-Profit Hospital Systems*, Becker's Hospital Review (Jul. 24, 2012), https://tinyurl.com/d8yd4k6. Unlike the small, church-associated agencies that "as a practical matter" could not create pension plans that would survive "subjection to ERISA," 124 Cong. Rec. 16,522 (statement of Sen. Talmadge), petitioners and other religiously-affiliated hospital conglomerates easily could maintain ERISA-compliant pension plans. These hospitals compete with large secular non-profit and for-profit entities such as HCA, Community Health Systems, Tenet Healthcare Corp., and the Mayo Clinic, all of which maintain ERISA-compliant plans. It is inconceivable that Congress sought to give hospitals like petitioners a leg-up on their competitors.

2. Though petitioners, like most hospitals, provide care for the needy, *see* Petrs. Br. 52, this does not support petitioners' claim for ERISA exemption. Congress did not eliminate the sunset clause because church agencies provide community services. Rather, as explained above, Congress eliminated the sunset

clause in recognition of church and church-agency employees' "unique need to be covered by one plan." 125 Cong. Rec. 10,052. If providing care for the needy had been part of Congress's calculus in the 1980 amendment, then all of petitioners' competitors—whether or not religiously affiliated—would also be ERISA-exempt. *All* hospitals that accept Medicare, religiously affiliated or not, must treat emergency patients regardless of their ability to pay under The Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd(h). And tax-exempt secular and religious hospitals also are required to provide community benefits to maintain their exemption and to comply with the Affordable Care Act. 26 U.S.C. § 501(r); *see* IRS Rev. Rul. 69-545, 1969 WL 19168 (Jan. 1, 1969).

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In sum, exempting petitioners from ERISA would have done nothing to advance Congress's goals. On the other hand, the narrow church-plan exemption, limited by the church-establishment requirement that Congress envisioned, both achieves Congress's goals and prevents large institutions from evading ERISA's employee protections.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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